

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

7-Eleven 34638A,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204771

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to uphold the decision by the Retailer Operations Division, to permanently withdraw the authorization of 7-Eleven 34638A (hereinafter, “Appellant” and/or “7-Eleven 34638A”) to participate in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR §§ 278.1(b)(3) and 278.1(l)(1)(iv), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it permanently withdrew the authorization of 7-Eleven 34638A to participate in the SNAP via letter dated November 20, 2017.

AUTHORITY

7 U.S.C. 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 ... may file a written request for review of the administrative action with FNS.

CASE CHRONOLOGY

The record includes a form FNS-252E *Supplemental Nutrition Assistance Program Application for Stores* received on October 12, 2012, signed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in which the answer to Question 14 – “Was any officer, owner, partner, member, and/or manager convicted of any crime after June 1, 1999?” – was No. The record indicates that 7-Eleven 34638A was authorized as a SNAP retailer effective November 9, 2012.

On November 14, 2016 5 U.S.C. § 552 (b)(6) & (b)(7)(C) filed form FNS-252 *Supplemental Nutrition Assistance Program Application for Stores* for 7-Eleven 34528A as a co-owner. In that Application 5 U.S.C. § 552 (b)(6) & (b)(7)(C) responded “Yes” to Question 14 – “Was any officer, owner, partner, member, and/or manager convicted of any crime after June 1, 1999?” The materials indicate “The Pierce County District Court Defendants Case History will be submitted with the additional documents for your review.”

In processing the November 14, 2016 Application it was discovered that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had been convicted of violating the State of Washington’s Revised Code of Washington (RCW) 69.50.401 on August 20, 1999. This conviction falls under 7 CFR § 278.1(b)(3)(i)(A) and therefore results in a determination that 7-Eleven 34638A should be permanently withdrawn in accordance with 7 CFR § 278.1(l)(1)(iv).

In a letter dated November 20, 2017 Appellant, and its owner, were advised by the Retailer Operations Division that the SNAP authorization of 7-Eleven 34638A was being permanently withdrawn.

Via letter dated November 30, 2017, received in the office of the Chief of the Administrative Review Branch on December 4, 2017, Appellant, through counsel requested an administrative review of the action to permanently withdraw 7-Eleven 34638A from participation as a SNAP authorized Retailer. The appeal was granted and the implementation of the permanent withdrawal has been held in abeyance, in accordance with 7 CFR § 279.4 (a).

During the pendency of the review counsel, on behalf of Appellant, filed a Freedom of Information Act (FOIA) request dated January 5, 2018, which the record indicates was fulfilled on March 16, 2018. Counsel has provided a “Brief” dated April 17, 2018 delineating the contentions in support of the instant administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)¹, 7 USC 2018 and 278 of Title 7 of the Code of Federal Regulations

¹ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted February 7, 2014 through P. L. 113-79.

(CFR).² Part § 278.1(l) establishes the authority upon which the authorization of any firm to participate as a SNAP retailer may be withdrawn.

7 CFR § 278.1(b)(3)(i)(A) provides, in relevant part, that “(3) FNS shall deny the authorization of any firm from participation in the program for a period of time as specified in paragraph (k) of this section based on consideration of information regarding the business integrity and reputation of the firm as follows: (i) Conviction of or civil judgment against the owners, officers or managers of the firm for: (A) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction.”

7 CFR § 278.1(l)(1)(iv) reads, in part, “(l) Withdrawing authorization. (1) FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons... (iv) The firm fails to maintain the necessary business integrity to further the purposes of the program, as specified in paragraph (b)(3) of this section. Such firms shall be withdrawn for lack of business integrity for periods of time in accordance with those stipulated in paragraph (k)(3) of this section for specific business integrity findings;”

7 CFR § 278.1(k)(3)(i), reads, in relevant part: “(3) The firm has been found to lack the necessary business integrity and reputation to further the purposes of the program. Such firms shall be denied authorization in the program for the following period of time: (i) Firms for which records of criminal conviction or civil judgment exist that reflect on the business integrity of owners, officers, or managers as stipulated in §278.1(b)(3)(i) shall be denied authorization permanently.”

APPELLANT’S CONTENTIONS

In the Brief supporting the request for administrative review Appellant, through counsel, indicates that:

- the Department has exceeded its authority in qualifying a past drug conviction as an issue of business integrity;
- there is no linkage between a business or a food store in relation to the cited conviction (*Warren vs. United States*, 2015 WL 5321765 (E.D. KY 2015));
- to permanently withdraw Appellant’s SNAP retailer authorization based upon a single prior conviction is unjust in consideration of *Howard v. Unites States*, 2013 WL 4046370 (N.D. Ohio 2013);
- there were no allegations that the owner’s offense was tied in any way to the operation of a business enterprise, nor that his offense was tied to any type of fraud or deceit which would have a bearing on his moral fitness;
- 7 USC 2018³ makes no mention of prior convictions of any type be considered in its evaluation but does require that such an evaluation be related to the business practices of the store;

² Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

³ Appellant’s Brief at page 6 of 7 cites 7 USC §1018 instead of §2018.

- Drug convictions have long been held to not be an issue of credibility or demonstrative of dishonesty (*U.S. vs. O'Neil*, 839 F.Supp.2d 1030 S.D. Iowa 2011); and, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is not listed anywhere in the Withdrawal Letter as having violated any part of 7 CFR § 278.1 despite being identified in a June 23, 2017 communication within the Department which states in relative part “Assuming we have the complete court documents for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), then his firm under FNS [redacted] can remain authorized, as [redacted] is not a co-owner of that store.” Appellant contends that the reference is to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that it contends is co-owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is recommended that legal counsel be sought, in accordance with 7 CFR § 279.6, to reach an appropriate decision regarding whether or not Appellant’s position that the grounds for withdrawal in this matter are not reasonably tied to business integrity

The preceding may represent only a brief summary of Appellant’s contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The record documents that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) plead guilty to a “Violation of Controlled Substance” as defined in Washington Code § 69.50.41 on August 11, 1999. The Tukwila Municipal Court Docket provided by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicates that he served a sentence of 90 days in jail (89 days suspended); and, made payment of a fine of \$1,000 (\$750 suspended) to comply with the sentencing imposed for the charges as of June 19, 2000.

This review finds that the conviction of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) under RCW 69.50.41 demonstrates a lack of business integrity such that falls under the SNAP provisions of 7 CFR § 278.1(b)(3)(i)(A) which requires a permanent withdrawal under 7 CFR § 278.1(l)(1)(iv) as delineated at 7 CFR § 278.1(k)(3)(i). The Retailer Operations Division has appropriately taken action under the specified regulations.

The record supports a conclusion that the conviction of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in consideration is almost 19 years old. However, it is noted that the SNAP retailer Application filed for Appellant firm on October 10, 2012, signed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), did not disclose the criminal conviction that occurred after June 1, 1999. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) failure to disclose the criminal conviction that occurred in August 1999 represents a lapse in honesty directly related to the SNAP authorization of 7-Eleven 34638A. The USDA holds that the business integrity and reputation of a firm is critically important to the effective operation of the SNAP. Therefore, the criteria outlined in the regulations focuses on the business integrity and reputation of the owners, officers and management of firms seeking authorization in the SNAP. Prior convictions relating to business integrity, reflects on the ability of a firm to effectuate the purposes of, and abide by the rules governing, the program. Under such circumstances, the agency regulations grant no discretion to the Retailer Operations Division or to the administrative review officer during an administrative review.

The implications and findings of the court rulings cited by Appellant's counsel have been considered as they relate to the instant case. The arguments presented through counsel have not been found to compel mitigation or reversal of the Retailer Operations Division determination.

Ownership Reference:

To Appellant's contention that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is not listed anywhere in the Withdrawal Letter as having violated any part of 7 CFR § 278.1 despite being identified in a June 23, 2017 communication within the Department which states in relative part "Assuming we have the complete court documents for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), then his firm under FNS [redacted] can remain authorized, as [redacted] is not a co-owner of that store." Appellant contends that the reference is to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that it contends is co-owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The reference is indeed to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and is therefore clerically misplaced in the instant Brief which addresses C0204771 linked to 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

CONCLUSION

Based on the discussion above, the decision by the Retailer Operations Division to permanently withdraw 7-Eleven 34638A to participate in the SNAP as an authorized retailer is sustained.

The permanent withdrawal will become effective 30 days after receipt of the instant Final Agency Decision in accordance with 7 CFR § 279.5(f).

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

NANCY BACA-STEPAN
Administrative Review Officer

May 24, 2018